Hong Huat Enterprise Sdn Bhd v Golden Vale Golf Range & Country Club Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO M-02-293 OF 1998
SHAIK DAUD JCA, SITI NORMA YAAKOB JCA AND ABU MANSOR FCJ
5 APRIL 1999

Land Law *— Licence — Mining — Agreement to mine sand on land invalid — Subsequent agreements to sell land to third party and right to appellant to mine sand — Land not transferred to appellant — Whether appellant acquired proprietory, beneficial or equitable interest over part of land*

Jaytra Sdn Bhd ('Jaytra') was the registered proprietor of a piece of land ('the land'). On 20 October 1991, Jaytra entered into an agreement with the appellant whereby Jaytra granted the appellant a licence to mine sand on the land ('the first agreement'). In August 1992, the appellant discovered that Jaytra had no capacity to enter into the first agreement as it had been wound up. It was conceded that the first agreement was invalid and unenforceable. Following a consent order, a tripartite sale and purchase agreement dated 31 May 1993 was entered into between Jaytra as the vendor, Airport Auto Centre Sdn Bhd ('Airport Auto') as the purchaser and Bank Utama as the chargee ('the second agreement'). This was followed by a second sale and purchase agreement dated 10 June 1993 ('the third agreement') entered into between Airport Auto with the appellant for the sale and purchase of 4/10th undivided share of the land. The third agreement provided, inter alia, the option to repurchase the land by Airport Auto. In the event the option was exercised, Airport Auto would grant the appellant the right to extract sand from the land. Airport Auto did not exercise the option to repurchase and the option lapsed on 9 December 1994. Jaytra then transferred the whole of the land to the respondent despite the consent order. The respondent brought an action against the appellant claiming for vacant possession of the land. The appellant filed a summons in chambers for an interlocutory mandatory injunction directing the respondent to allow the appellant access to the land so that they could continue with their sand mining operations. The High Court dismissed the appellant's application on the grounds: (i) there was already an adequate remedy in cl 5 of the third agreement; (ii) as Airport Auto had not exercised their option to repurchase the land, the appellant's right to continue its sand mining operations on the land became questionable; and (iii) the appellant had failed to show that it had a strong and clear case to warrant the issue of a mandatory injunction. The appellant appealed.

Held, dismissing the appeal:

(1) (Per **Abu Mansor FCJ**) It is trite law that the appellate courts do not interfere with the exercise of discretion by the High Court

unless there is a clear error of law or against the weight of evidence. In the present case, there was absence of any error. The judge had followed the correct authority on the point and considered the correct questions. He had made a correct finding before exercising his discretion to refuse the injunction sought for (see pp 749G–H, 750C). A

(2) (Per **Siti Norma Yaakob JCA**) The appellant could not heard to say that it derived an interest in the land following the granting of the licence to mine the land under the first agreement as on its own admission it had accepted that first agreement to be invalid and unenforceable. Clearly between October 1991 until the date of the third agreement on 10 June 1993, the appellant had no right to be on the land and during that period was a trespasser (see p 745A, C). B C

(3) (Per **Siti Norma Yaakob JCA**) The appellant did not acquire any proprietory or beneficial interest over any part of the land despite the third agreement being a sale and purchase agreement and despite the appellant fulfilling its obligations by tendering the purchase price in full as no part of the land was transferred to the appellant. Recital 6 of the third agreement describing Airport Auto as a beneficial owner of the land was misleading and entirely without basis as Jaytra who was the registered proprietor of the land until 9 December 1994, never transferred any part of the land to Airport Auto before that date. For that reason, it was legally impossible for Airport Auto to execute a valid and registrable transfer of 4/10th of the land purchased in favour of the appellant (see p 745D–G). D E

(4) (Per **Siti Norma Yaakob JCA**) After 9 December 1994, the appellant has no right to be on the land equitable or otherwise and that its continued occupation was that of a trespasser per se and as such its claim that its status quo over the land should be maintained had no basis whatsoever (see p 746E). F

(5) (Per **Siti Norma Yaakob JCA**) The land had already been acquired by the respondent and although such acquisition was in contravention of the consent order, the respondent could not be faulted as they were not bound by the court order. As the registered proprietors, the respondents were entitled to regard the appellant as trespasser as well as the valid right to assert their proprietory rights by evicting the appellant from the land (see pp 746I–747A). G H

[Bahasa Malaysia summary

Jaytra Sdn Bhd ('Jaytra') adalah tuan punya berdaftar sebidang tanah ('tanah tersebut'). Pada 20 Oktober 1991, Jaytra telah memasuki suatu perjanjian dengan perayu di mana Jaytra memberikan perayu suatu lesen untuk melombong pasir di atas tanah ('perjanjian I

A pertama'). Pada bulan Ogos 1992, perayu telah mendapati bahawa Jaytra tiada kuasa untuk memasuki perjanjian pertama kerana ia telah digulungkan. Adalah dihujahkan bahawa perjanjian pertama adalah tidak sah dan tidak boleh dikuatkuasakan. Berikutan satu perintah persetujuan, satu perjanjian jualbeli tiga pihak bertarikh 31 Mei 1993 dimasuki antara Jaytra sebagai penjual, Airport Auto Centre Sdn Bhd B ('Airport Auto') sebagai pembeli dan Bank Utama sebagai pemegang gadaian ('perjanjian kedua tersebut'). Ini diikuti dengan perjanjian jualbeli yang kedua bertarikh 10 Jun 1993 ('perjanjian ketiga tersebut') yang dimasuki antara Airport Auto dengan perayu untuk jual beli 4/10 bahagian tanah yang tidak dibahagi. Perjanjian ketiga C tersebut memperuntukkan, antara lain, pilihan untuk membeli semula tanah tersebut oleh Airport Auto. Jika pilihan tersebut dibuat, Airport Auto akan memberikan perayu hak untuk melombong pasir daripada tanah. Airport Auto tidak membuat pilihan untuk membeli semula tersebut yang luput pada 9 Disember 1994. Kemudian Jaytra memindahkan semua bahagian tanah kepada responden walaupun D terdapat penghakiman persetujuan tersebut. Responden membawa tindakan terhadap perayu menuntut milikan kosong tanah tersebut. Perayu telah memfailkan saman-dalam-kamar untuk injunksi mandatori interlokutori mengarahkan responden untuk membenarkan perayu akses kepada tanah tersebut agar mereka boleh meneruskan operasi-operasi melombong pasir. Mahkamah Tinggi E telah menolak permohonan perayu atas alasan-alasan: (i) sudah terdapat remedi yang mencukupi di dalam fasal 5 perjanjian yang ketiga tersebut; (ii) oleh kerana Airport Auto tidak melaksanakan pilihan mereka untuk membeli semula tanah, hak perayu untuk meneruskan operasi melombong di atas tanah menjadi persoalan; dan (iii) perayu gagal untuk menunjukkan bahawa ia mempunyai kes yang F kuat dan jelas untuk menjustifikasikan pengeluaran injunksi mandatori. Perayu telah merayu.

Diputuskan, menolak rayuan tersebut:

G (1) (Per **Abu Mansor HMR**) Adalah undang-undang yang tidak dipertikaikan bahawa mahkamah rayuan tidak menganggu pelaksanaan budi bicara oleh Mahkamah Tinggi kecuali terdapat kesilapan undang-undang yang jelas atau bercanggah dengan beban keterangan. Di dalam kes ini, tiada terdapat kesilapan tersebut. Hakim telah mengikut autoriti yang betul berkenaan H perkara tersebut dan mempertimbangkan persoalan-persoalan yang betul. Beliau telah membuat penemuan yang betul sebelum menjalankan budi bicaranya dengan menolak injunksi yang dipohon (lihat ms 749G–H, 750C).

(2) (Per **Siti Norma Yaakob HMR**) Perayu tidak boleh mengatakan bahawa ia memperoleh suatu kepentingan di dalam tanah I berikutan pemberian lesen untuk melombong di bawah perjanjian pertama tersebut kerana di atas pengakuannya sendiri ia telah menerima perjanjian pertama tersebut sebagai tidak sah dan tidak

boleh dikuatkuasakan. Dengan jelas antara Oktober 1991 sehingga tarikh perjanjian yang ketiga pada 10 Jun 1993, perayu tiada hak untuk berada di atas tanah dan pada masa tempoh tersebut adalah penceroboh (lihat ms 745A, C). A

(3) (Per **Siti Norma Yaakob HMR**) Perayu tidak memperoleh sebarang kepentingan ketuanpunyaan atau benefisial ke atas apa-apa bahagian tanah walaupun perjanjian ketiga tersebut merupakan perjanjian jualbeli dan walaupun perayu tersebut memuaskan obligasinya dengan menawarkan harga beliannya secara penuh kerana tiada apa-apa bahagian tanah tersebut telah dipindahkan kepada perayu. Mukadimah 6 perjanjian ketiga tersebut yang menggambarkan Airport Auto sebagai tuan punya benefisial tanah tersebut adalah mengelirukan dan tiada dasar langsung kerana Jaytra yang merupakan tuan punya berdaftar tanah tersebut sehingga 9 Disember 1994, tidak memindahkan apa-apa bahagian tanah kepada Airport Auto sebelum tarikh tersebut. Untuk alasan tersebut, adalah mustahil dari segi undang-undang bagi Airport Auto untuk melaksanakan pemindahan yang sah dan boleh didaftarkan 4/10 bahagian tanah yang dibeli bagi pihak perayu (lihat ms 745D–G). B C D

(4) (Per **Siti Norma Yaakob HMR**) Selepas 9 Disember 1994, perayu tiada hak untuk berada di atas tanah dari segi ekuiti atau sebaliknya dan pendudukannya secara berterusan adalah sebagai penceroboh semata-mata dan dengan itu tuntutannya bahawa status quo ke atas tanah tersebut patutlah dikekalkan tiada dasar langsung (lihat ms 746E). E

(5) (Per **Siti Norma Yaakob HMR**) Tanah tersebut telah pun diperoleh oleh responden dan walaupun pemerolehan sedemikian adalah bercanggah dengan perintah persetujuan, responden tidak boleh dipersalahkan oleh kerana mereka tidak diikat oleh perintah mahkamah. Sebagai tuan punya-tuan punya berdaftar, responden-responden berhak menganggap perayu sebagai penceroboh dan begitu juga mempunyai hak sah untuk menegaskan hak-hak pemunyaan dengan mengusir perayu dari tanah tersebut (lihat ms 746I–747A).] F G

Notes

For cases on licence generally, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 2299–2312. H

Cases referred to

American Cyanamid Co v Ethicon [1975] 1 All ER 504 (refd)
Gibb & Co v Malaysia Building Society Bhd [1982] 1 MLJ 271 (refd)

Liza Chan (Chew Chang Min with her*) (Peter Yip & Yong)* for the appellant. I

Hilary D'Cruz (Mohd Latip & Associates) for the respondents.

Shaik Daud JCA: I have read the judgment of Siti Norma Yaakob JCA, and I concur with it.

Siti Norma Yaakob JCA: The subject matter of the dispute between the parties in these proceedings is over a piece of land held under Grant No 4749, Lot 208, Mukim of Batang Melaka, Daerah Jasin, Melaka, measuring approximately 1066 acres ('the land'). However the instant appeal is only concerned with whether an interlocutory mandatory injunction can be issued to restrain the respondent/plaintiff from ejecting the appellant/respondent from the land. For a better understanding of the issues raised before us, I need to go back as far as 1991 to recount the various events that have occured and the consequential rights and obligations that have been acquired by all parties concerned.

On 20 October of that year, the registered proprietor of the land was a company known as Jaytra Sdn Bhd, ('Jaytra') which was managed by one Chun Nyook Lin ('Chun'), (the second third party in the court below) and her husband, Wu Soo Hwa ('Wu') On that date, Jaytra entered into an agreement with the appellant wherein Jaytra granted the appellant a 'licence to mine and sell sand, rock and other materials on the land until such deposits have been exhausted on payment of a tribute ('the first agreement'). On the strength of the first agreement, the appellant moved into the land and started its sand mining operations.

Sometime in August 1992, the appellant discovered that Jaytra had no capacity to enter into the first agreement as it had been wound up by an order of court dated 9 May 1988, at the instance of a creditor and Wu, who signed the agreement on behalf of Jaytra was an undischarged bankrupt. Before us, counsel for the appellant conceded that the first agreement is invalid and unenforceable.

On 20 August 1992, Bank Utama (M) Bhd, ('Bank Utama') a chargee of the land issued a notice to the appellant to cease all sand mining operations on the land and to vacate the land. The appellant also received a similar notice dated 22 September 1992, from the official receiver as the liquidator for Jaytra.

As the appellant had expended time and money on its sand mining operations, it persuaded Bank Utama to purchase all of Jaytra's landed properties including the land for RM6.2m. However the intended sale was to be made through another company by the name of Airport Auto Centre Sdn Bhd ('Airport Auto') the first third party in the court below, whose two subsciber shares are held by Chun and a relative. As Airport Auto had no funds to purchase the lands, they requested the appellant to defray the deposit and initial expenses amounting to RM200,000. The appellant agreed to make the advance for payment to Bank Utama provided:

(1) that it be given the right to purchase the land for RM500,000, from Airport Auto so that it can continue with its sand mining activities on the land;

(2) that Airport Auto will have the option to repurchase the land from the appellant for RM500,000, such option to be exercised within 30 days from the completion of the sale of the land to the appellant;

(3) in the event the option is not exercised, Airport Auto will grant the appellant the right to extract the sand from the land on terms similar to the first agreement entered into between the appellant and Jaytra; and

(4) in the event the sale of Jaytra's landed properties to Airport Auto is not completed or the lands are sold to other parties, Airport Auto will make a refund of the deposit to the appellant, such refund being guaranteed by Wu.

On 12 February 1993, Bank Utama obtained a consent order in Originating Summons No 31-1322-86 to have all of Jaytra's landed properties, including the land, sold by way of private treaty to Airport Auto for RM6.2m on terms and conditions as set out in the draft sale and purchase agreement annexed to the affidavit in support of the order for sale and upon terms to be agreed upon between Bank Utama and the official receiver as the liquidator for Jaytra.

Following the consent order, a tripartite sale and purchase agreement dated 31 May 1993, ('the second agreement') was entered into between Jaytra, the vendor, Airport Auto, the purchaser and Bank Utama, the chargee. This second agreement was necessary as Bank Utama had yet to be paid all sums due for facilities it had extended to one Waraco Industries Sdn Bhd, the security for which was provided by Jaytra by way of a first legal charge of the land. By this agreement, Jaytra agreed to settle all sums due to the bank from the proceeds of sale.

This was followed by a second sale and purchase agreement dated 10 June 1993, ('the third agreement') entered into by Airport Auto with the appellant specifically for the sale and purchase of 4/10th undivided share of the land and the third agreement contained, inter alia, the following clauses.

(1) the purchase price was agreed at RM200,000 (cl 1);

(2) the irrevocable option to repurchase the land by Airport Auto was to be exercisable within 12 months from the completion date at the purchase price of RM200,000 with a right to an extension of a further six months to exercise the option (cl 2);

(3) in the event the option was exercised, Airport Auto would grant the appellant the right to extract sand from the land on payment of a tribute (cl 3); and

(4) the balance of the purchase price of RM138,000 was to be paid by the appellant to the Airport Auto's solicitors within 14 days from the execution of the agreement (cl 4).

It is not disputed that in addition to the deposit of RM62,000 the appellant had also paid up the balance of the purchase price in full and that Airport Auto did not exercise the option to repurchase. The option has also lapsed originally on 9 June 1994, and finally on 9 December 1994. Interestingly on that day itself, Jaytra transferred the whole of the land to the respondent. This was done despite the order of court dated 12 February 1993.

A year later on 14 December 1995, the respondent as the registered proprietor of the land issued a notice to the appellant demanding that the appellant cease all its sand mining activities, remove all its equipment and machinery and deliver vacant possession of the land to them as they regard the appellant to be a trespasser carrying on wrongful sand mining on their land. The appellant responded by its letter dated 22 December 1995, denying the allegation that it was a trespasser as its occupation of the land was lawful under the first agreement with Jaytra and subsequently by the third agreement with Airport Auto.

Nothing was heard from the respondent for the next $1^1/_2$ years until the appellant received a second notice from the respondent dated 2 July 1997, which made similar demands as in the first notice and giving the appellant seven days from the receipt of the notice within which to comply. In its reply dated 7 July 1997, the appellant maintained the same stand that it took in its response to the respondent's first notice of demand and refused to vacate the land. This led to the respondent filing Civil Suit No 22-72-97 against the appellant on 12 September 1997, seeking three principal prayers for:

(1) vacant possession of the land;

(2) damages for trespass; and

(3) an account of all rentals and/or profit derived from the appellant's sand mining activities;

In its statement of defence, the appellant averred to the stand that it had taken all along and went further to allege that the transfer of the land to the respondent was in complete breach of the third agreement and the means to deprive it of its interest on the land. On the basis of that allegation the appellant counterclaimed that the third agreement be specifically enforced or alternatively damages in lieu thereof.

Following the filing of the statement of defence and counterclaim and sometime in early December 1997, the respondent erected a barrier to the access road leading to the land and positioned security guards at the barrier to control all movements in and out of the land. This forced the appellant to lodge three police reports, one on 8 December 1997, and two on 11 December 1997, as its workers and vehicles were barred from entering the land. In a letter dated 11 December 1977, addressed to the respondent, the appellant's solicitors demanded that the security barrier be removed so that the appellant could continue with its sand mining operations failing which the respondent was threatened with a mandatory injunction. To worsen the situation, the appellant alleged that the respondent had damaged the access road with an excavator and destroyed bunds and ponds causing large amounts of water and mud to spill and flood the area. The spillage covered and destroyed not only the appellant's equipment and machinery at the site but also caused danger to the lives of the villagers living within the mining area.

When nothing was done to diffuse the situation, the appellant filed a summons in chambers for an interlocutory mandatory injunction directing the respondent, their servants and agents to remove all barriers leading to

the land as well as the security guards, to allow the appellant, its servants and agents access to the land so that they can continue with their sand mining operations and to compensate the appellant for all damages resulting from the respondent's wrongful acts.

The High Court at Malacca dismissed the appellant's application on the following arounds:

(1) there is already an adequate remedy in cl 5 of the third agreement;

(2) as the respondent had not exercised their option to repurchase the land the appellant's right to continue its sand mining operations on the land becomes questionable; and

(3) the appellant had failed to show that it has a strong and clear case to warrant the issue of a mandatory injunction.

In the court below, the parties relied on two affidavits, one in support and the other in reply to the application. In their affidavit in reply, the respondent admitted that they had erected the barriers leading to the land, and had placed guards at the barriers to prevent the appellant's servants and vehicles from entering the mining area. However they justified their actions by stating that the appellant's continued mining activities were a source of danger to the lives and properties of the neighbouring villages.

In this respect, they had engaged an engineering consultant to do a site investigation and in his report dated 13 December 1995, the engineer confirmed that the appellants sand mining activities posed a real danger to the neighbourhood surrounding the mining site. The report also recommended that the respondent conduct geotechnical investigations to ensure the safety aspect of the existing bunds and ponds created at the mining site. The respondent did so and obtained a further report from a geotechnical expert dated 10 November 1997, which confirmed that soil erosion would destablize the lands causing them to collapse and large amounts of water and mud would flood the neighbouring villages located at low ground and the consequences will be loss of life and property. The respondent contended that it was in reliance of this second report that they had taken preventive measures by reducing the water levels in the bunds and ponds and draining the water to prevent any possible flooding to the villages and forest reserve.

The evidence of imminent danger caused by the continued sand mining activities of the appellant since 1991 is documented by the many contemporaneous documents, visual and otherwise, produced by the respondent. The appellant chose to disregard the report of the consulting engineer when a copy of it was tendered and treated the concern of imminent danger expressed in the report to be unfounded. As the registered owner of the land, the respondent had been receiving complaints from various quarters all pointing to the safety aspect of the appellant's mining activities and in this regard, there is no doubt that there was justification in the respondent acting as they did to prevent the occurence of a real threat to life and property.

A Perhaps the real issue before us is the determination of the appellant's status as to its continued occupation of the land. The appellant cannot be heard to say that it derived an interest in the land following the granting of the licence to mine the land under the first agreement as on its own admission it had accepted that first agreement to be invalid and unenforceable. In this respect, the respondent had tendered a statutory B declaration affirmed by a director of Jaytra on 27 February 1998, stating that when the first agreement was executed, the appellant was fully aware that Jaytra had no legal capacity to enter into the agreement but nonetheless the appellant took the risk that the first agreement may be invalidated as it wanted to obtain a sand mining licence from the relevant authority. The C appellant however had not responded to this statutory declaration.

Clearly between October 1991 until the date of the third agreement on 10 June 1993, the appellant had no right to be on the land and during that period it was a trespasser. However, the appellant's right to be on the land after that is regularized by the third agreement, and the appellant can only rely on the provisions of the third agreement to support its claim that it has D an equitable interest over the land.

For starters I need to point out that the appellant did not acquire any proprietory or beneficial interest over any part of the land despite the third agreement being a sale and purchase agreement and despite the appellant fulfilling its obligations by tendering the purchase price in full as no part of E the land was transferred to the appellant. There is clearly no endorsement of any ownership to the appellant in the title as seen from the copy exhibited. In any event, Airport Auto, the vendor, could not legally effect any transfer of the land to the appellant as Airport Auto had never acquired any proprietory interest over the land in the first place. In this instance, recital 6 of the third agreement describing Airport Auto as a beneficial F owner of the land is most misleading and entirely without basis as Jaytra who was the registered proprietor of the land until 9 December 1994, never transferred any part of the land to Airport Auto before that date. For that very reason too, it is legally impossible for Airport Auto to fulfill the mandatory obligation imposed by cl 8 of the third agreement. By that clause, Airport Auto were required to execute a valid and registrable G transfer of 4/10th of the land purchased in favour of the appellant for the purpose of stamp duty adjudication and presentation of the documents for registration.

Another aspect of the third agreement relates to Airport Auto's right to exercise their irrevocable option to repurchase the land sold from the H appellant. That irrevocable option is mentioned in cll 1, 2 and 3. Clause 2 contains provisions when Airport Auto can exercise the option subject to one extension and cl 3 goes further to state the consequence in the event the option is exercised. It is not disputed that Airport Auto never exercised the option and it lapsed finally on 9 December 1994, but there are no provisions in the third agreement governing the rights of the parties in the event the I option was not exercised. This state of affairs had led the learned owner of the land is most misleading and entirely without basis as Jaytra who as the registered proprietor of the land until 9 December 1994, never transferred

any part of the land to Airport Auto before that date. For that very reason too, it is legally impossible for Airport Auto to fulfill the mandatory obligation imposed by cl 8 of the third agreement. By that clause, Airport Auto was required to execute a valid and registrable transfer of 4/10th of the land purchased in favour of the appellant for the purpose of stamp duty adjudication and presentation of the documents for registration.

Another aspect of the third agreement relates to Airport Auto's right to exercise their irrevocable option to repurchase the land sold from the appellant. That irrevocable option is mentioned in cll 1, 2 and 3. Clause 2 contains provisions when Airport Auto can exercise the option, subject to one extension and cl 3 goes further to state the consequence in the event the option is exercised. It is not disputed that Airport Auto never exercised the option and it lapsed finally on 9 December 1994, but there are no provisions in the third agreement governing the rights of the parties in the event the option was not exercised. This state of affairs had led the learned trial judge to question the legality of the appellant's continued occupation of the land after 9 December 1994, as he reasoned that the appellant's right to mine sand from the land ceased at that date unless fresh arrangements had been entered into with Airport Auto. We know that no such fresh arrangements had been entered into as there is no evidence to that effect, and in any event if there had been such an intention, it had been superseded by Jaytra's action in transferring the land to the respondent on the very day the irrevocable option had lapsed.

From the facts, we have no reason to disagree with the finding of the learned trial judge for clearly after 9 December 1994, the appellant has no right to be on the land, equitable or otherwise, and that its continued occupation was that of a trespasser per se, and as such its claim that its status quo over the land should be maintained has no basis whatsoever.

Another conclusion that was reached by the court below was that damages was an adequate remedy under cl 5 of the third agreement which stipulates that in the event of Airport Auto's breach in failing to complete the sale, the appellant would be entitled to the refund of the deposit sum paid under cl 1 and the agreement is deemed terminated and becomes null and void.

In response to that finding, the appellant contends that the amount of damages stipulated in cl 5 is not realistic as it had expended RM2.6m for its mining operations since 1991 and the justice of the case demands that it be allowed to continue with its mining activities by the issue of a mandatory injunction. That contention would be acceptable if the appellant had shown that it had a right to be on the land in the first instance. I have already pointed out that no such right existed as it cannot derive any advantage or right under the first agreement which it has admitted is unenforceable. The same fate befalls the third agreement as the sale and purchase of the land can no longer be effected by Airport Auto as firstly Airport Auto never acquired any interest, proprietary or otherwise, over the land and it cannot pass on to the appellant that it never had. Secondly the land has already been acquired by the respondent and although such acquisition is in

A contravention of the order of the court dated 12 February 1993, the respondent cannot be faultered as they are not bound by the court order. If any body is to be made answerable for contravening the court order, that guilty party must be Jaytra. As the registered proprietors, the respondents are entitled to regard the appellant, who has not shown any justifiable right to be on the land, as a trespasser as well as the valid right to assert their B proprietory rights by evicting the appellant from the land.

There were other issues rallied before us that were never argued in the court below, and as such we do not propose to determine them particularly when we have concluded that the appellant had failed to establish any bona fide right to be on the land and the determination of this issue alone is C sufficient reason for us to reject this appeal. Since the facts disclose no serious question to be tried, we have concluded that the trial judge had exercised his discretion correctly when he refused the appellant's application or a mandatory injunction and on this finding we have dismissed this appeal with costs and ordered that the deposit he paid out to the respondent to account of their taxed costs.

D

Abu Mansor JCA: On 17 December 1998, after hearing substantive arguments, we unanimously dismissed the appellant/defendant's appeal against the learned judge's decision of 21 April 1998, refusing the defendant's application for an injunction against the plaintiff with costs. The central issue of this appeal was whether the learned judge was correct E in his refusal of the injunction applied for.

The facts of the case for the most part are not in dispute. In the skeletal submissions of the appellant's counsel, he enumerated ten items of agreed facts. The learned judge's burden of finding the agreed facts must have been considerably lessened.

F The facts as found by the learned judge are as follows. On 9 December 1994, the plaintiff became the registered proprietor of Grant No 4749, Lot 208, Mukim Batang Melaka, Daerah Jasin ('the land'). The said land was occupied by the defendant.

The next event of importance was on 12 September 1997 when the G plaintiff sued the defendant for vacant possession and it pleaded not only that the defendant had entered the said land without its consent but was also carrying on mining activities thereon.

On 24 October 1997, the defendant applied for and issued a third party notice against Airport Auto Centre Sdn Bhd ('Airport Auto') and against one Chun Nyook Lin. On 7 November 1997, the defendant then filed its H statement of defence and also counterclaimed.

Very relevant to this appeal before us, is the subsequent action of the defendant. On 9 February 1998, the defendant proceeded to file an application for the following orders that:

I (a) the plaintiff be compelled to remove the barriers put up on the land;

(b) the plaintiff be compelled to remove the security guards from the land;

(c) the plaintiff be made to compensate it for the expenses incurred in remedying the damage caused to the land; and

(d) the plaintiff be restrained from preventing it from entering the land.

In support of its application, the defendant alleged and was not disputed by the plaintiff, that it had entered into an agreement with the previous owner of the land, Jayatra Sdn Bhd, on 20 October 1991 pursuant to which it was given a right to mine the land indefinitely subject to payment of tribute. In the execution of the agreement, Jayatra Sdn Bhd was represented by Wu Soo Hwa, a bankrupt, and his wife Chun Nyook Lin.

Sometime in 1992 the defendant came to know that Jayatra Sdn Bhd had already been placed under receivership since 1988. As the defendant had invested a substantial sum of money in the sand mining project, it had to ask Wu Soo Hwa to resolve the problem. Wu Soo Hwa informed the defendant that his wife intended to purchase the land, with the approval of the official receiver, through a company called Airport Auto in which the subscriber shares were held by Chun Nyook Lin and one Chun Jee Cheng. As Airport Auto had no funds for the intended purchase of the land, Wu Soo Hwa asked the defendant for an advance of RM200,000 in order to pay the initial deposit and other expenses. The defendant agreed.

On 31 May 1993, Airport Auto entered into a sale and purchase agreement with the official receiver, who acted on behalf of Jayatra Sdn Bhd, for the purchase of the land. Then on 10 June 1993 Airport Auto entered into an agreement with the defendant, the most relevant terms of which, inter alia, were that:

(a) Airport Auto will sell and transfer 4/10 undivided shares of the land to the defendant for the sum of RM200,000;

(b) Airport Auto has the option to re-purchase the 4/10 undivided shares from the defendant at the same price within 12 months from the date of the agreement;

(c) pending the exercise of the option the defendant need only pay Airport Auto a tribute of RM6 per lorry load of sand extracted and sold by the defendant and upon completion of the re-purchase, the tribute shall be increased to RM10 per lorry load; and

(d) the agreement was to be binding on the respective successors in title, permitted assigns, heirs and personal representatives of the parties.

Airport Auto did not exercise the option and so it lapsed. In 1995, the defendant realized that the land had been sold to the plaintiff which is owned and controlled by Chun Nyook Lin and Chun Jee Cheng. Rightly or wrongly the defendant, therefore, contended that the plaintiff is bound by the agreement dated 10 June 1993 that it had entered into with Airport Auto and accordingly prayed for an order of specific performance of the agreement, alternatively, damages in lieu thereof. In its affidavit in support of the application for the interlocutory injunction the defendant averred that it had been carrying on mining activities on the land since 1991 and had expended a sum of RM2,600,000 for that purpose.

A After this action had been filed and following the defendant's refusal to surrender possession of the land, the plaintiff 'stole a march' and indulged in self-help and erected a barrier to the access road leading to the land and engaged a firm of security guards to prevent any movement to or out of the land. The plaintiff had also caused damage to the defendant's equipment and machinery on the site. The damage suffered by the defendant can be B gathered from para 13 of its affidavit which reads as follows:

> The defendant's mine is effectively destroyed and ceased to be operable notwithstanding any interlocutory or final relief granted by this honourable court in the above action. By these acts, the plaintiffs have forcibly assumed possession of the said land to the exclusion of the defendant and has pre-
> C empted the decision of the court in this action rendering further proceedings superfluous.

After hearing arguments and having considered the facts of this case in its totality and the applying of the law to the facts as found, the learned judge held at p 50 of his considered judgment:

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> In any event, para 13 of the affidavit filed by the defendant in support of its application showed that its sand mine had been destroyed and was not capable of being operated. The appropriate remedy in such circumstances would be an award for damages and the defendant had, accordingly, claimed damages as an alternative remedy to specific performance. Thus the grant of an interlocutory mandatory injunction would not assist the defendant in any way.
> E In the premises it was my view that the defendant had failed to show that its case was unusually sharp and clear to warrant the grant of an interlocutory mandatory injunction in its favour. Furthermore, this was not a proper case for the grant of such an injunction as the mining operation had been brought to a complete standstill and an award of damages would be a more appropriate remedy.
> F In the upshot, I dismissed the defendant's application with costs.

The appeal

The sum total of the contention of the appellant before us was that the learned judge had erred in not granting the appellant the interlocutory G injunction prayed for.

It is clear to us that what was at stake was the learned judge had not exercised his discretion in the appellant's favour. It is also trite law we do not lightly interfere with the exercise of such discretion unless there is a clear error of law or against the weight of the evidence.

H In this case, with respect to the appellant there was absence of any error. The learned judge had followed the correct authority on the point and considered the following questions. They are:

(a) there must be a serious question to be tried;

I (b) if the applicant were to succeed at the trial, damages would not be adequate compensation for the loss;

(c) the balance of convenience lies in his favour; and

(d) there are special circumstances in his favour or no special circumstances in favour of the respondent. A

The learned judge held that in *American Cyanamid Co v Ethicon* [1975] 1 All ER 504, the above questions must be satisfied by the applicant before he is entitled to interlocutory relief prayed for.

The learned judge also considered the law that, although a mandatory injunction is not normally given, in appropriate cases it may be so granted such as where there is plainly no defence to the action and the only reason for filing of the defence is to create a delay, then in such circumstances an injunction may be issued even if it gives the applicant the whole remedy before trial. In enforcing his judgment the learned judge quoted the well-known and often repeated judgment of Abdoolcader J (as he then was) in *Gibb & Co v Malaysia Building Society Bhd* [1982] 1 MLJ 271. B C

It is clear to us that the learned judge had made a correct finding at pp 48–49 of his judgment before exercising his discretion to refuse the injunction sought for. He held, we quote: D

> The crux of the defendant's claim was anchored on the agreement dated 10 June 1993 that it had entered into with Airport Auto. As the land had been sold in breach of this agreement to the plaintiff the defendant prayed for specific performance of the agreement. The agreement specifically provides for relief when there is failure by Airport Auto to complete the sale and purchase of the land. The relief is provided by cl 5 of the agreement. It reads as follows: E
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> > 'In the event that the vendor fails to complete the sale and purchase of the said property the vendor shall refund the deposit sum to the purchaser and such refund shall be guaranteed by Mr Wu Soo Hwa (NRIC No 3395041) and this agreement is deemed terminated and is null and void henceforth.' F
>
> Clauses 8 and 9 of the agreement deal with the obligation of the vendor to ensure that the defendant's share of the property is registered in its name. Failure by Airport Auto to take this agreed step by selling the land to the plaintiff means that it has failed to complete the sale and purchase of the land. The remedy for this breach is as provided by cl 5 of the agreement and nothing more. In the premises the prayers sought by the defendant in its application were without any merit. G
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> The defendant's right to continue its mining operations on the land in the event Airport Auto exercised its option to purchase the defendant's share of the land is governed by cl 3 of the agreement. It reads as follows:
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> > 'In the event that the vendor exercises the option to re-purchase the said property, the vendor shall grant the purchaser the right to extract sand/earth from the said property with payment of RM6 per lorry load (5 cu yd) to be made to the vendor and upon completion of the option to re-purchase the purchaser shall pay RM10 per lorry load to the vendor.' H
>
> The language employed in the clause shows that it only covers the position of the defendant's right to extract sand from the land if Airport Auto did in fact exercise its option to re-purchase its share of the land. No provision had been made regarding the defendant's rights if the option was not exercised. It was not in dispute that the option was not exercised. In accordance with cl 3 of the I

A agreement the defendant's right to extract sand from the land would therefore cease unless it had entered into fresh arrangements with Airport Auto for such a right. No such arrangements were entered into. Thus the defendant's claim to its right to continue with the sand mining operations on the land is questionable.

B As we have earlier stated, we find no error in the learned judge's judgment. We find no reason why we should interfere. We, therefore, dismissed this appeal with costs to be taxed.

Appeal dismissed.

C Reported by Jafisah Jaafar

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